

Montana Water Court
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FILED
01/18/2023
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
40K-0057-R-2022
White, Eugene
3.00

IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
WHITEWATER CREEK - BASIN (40K)
PRELIMINARY DECREE

CLAIMANTS: Milton J. Olsen; Olsen South Partnership

CASE 40K-0057-R-2022
40K 167541-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

The above-captioned claim appeared in the Preliminary Decree for the Lower Missouri River Division, Whitewater Creek. The claim received issue remarks during the DNRC's claims examination.

The claim was consolidated into Case 40K-0057-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 40K 167541-00 appeared in the Preliminary Decree as a stock water claim. The claim received the following issue remark:

THE PLACE OF USE APPEARS TO NEED MODIFICATION BASED ON THE DNRC CORRECTION TO THE POINT OF DIVERSION. THE CORRECT PLACE OF USE LEGAL LAND DESCRIPTION APPEARS TO BE THE S2SESW SEC 26, TWP 36N, RGE 32E, PHILLIPS COUNTY.

2. On May 19, 2022, the Court ordered Claimant to provide information or evidence if the proposed modification to the place of use for claims 40K 167541-00 was not historically accurate. Nothing was filed by the ordered deadline.

3. On August 9, 2022, the Court set a deadline for the claimants to show cause why the place of use should not be modified as described in the above-listed issue remark. Again, nothing was filed by the ordered deadline.

4. Claim 40K 167541-00 also received a notice-type issue remark during the DNRC's claim reexamination.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is "more probable than not." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The issue remark regarding the modifications to the place of use for the above-captioned claim overcomes the prima facie status of the claim. Taken together, the issue remark coupled with Claimant's non-response to the filing deadlines indicate that the proposed modifications to the place of use are historically accurate and show by a preponderance of the evidence that the place of use should be modified as described in Finding of Fact No. 1. This modification resolves the issue remark, and the issue remark should be removed from the claims.

2. The notice-type issue remark appearing on claim 40K 167541-00 served its notice purpose and should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Milton J. Olsen
250 Tenderfoot Lane
Stevensville, MT 59870-3700
~~P.O. Box 572~~
~~Havre, MT 59501-0572~~

Olsen South Partnership
5713 E. Whitewater Rd.
Whitewater, MT 59544

Service List Updated: 1/15/2023

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WHITEWATER CREEK
BASIN 40K

Water Right Number: 40K 167541-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: OLSEN SOUTH PARTNERSHIP
5713 E WHITEWATER RD
WHITEWATER, MT 59544

MILTON J OLSEN
250 TENDERFOOT LANE
STEVENSVILLE, MT 59870 3700

Priority Date: DECEMBER 31, 1920

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: INTERIOR DRAINAGE

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2SESW	26	36N	32E	PHILLIPS

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	S2SESW	26	36N	32E	PHILLIPS

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			S2SESW	26	36N	32E	PHILLIPS